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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ROSA WHITE,

Plaintiff and Appellant,

v.

PAUL E. DIEHL, M.D.,

Defendant and Respondent.

B213151

(Los Angeles County
Super. Ct. No. LC078249)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Patricia Schnegg, Judge. Affirmed.

Abrams, Tofer & Reghabi and Ross K. Reghabi for Plaintiff and Appellant.

La Follette, Johnson, De Haas, Fesler & Ames, Don Fesler, David J. Ozeran
and Diana S. Diskin for Defendant and Respondent.

INTRODUCTION

In a wrongful death action brought by plaintiff Rosa White against various defendants,¹ the trial court granted summary judgment in favor of respondent Paul E. Diehl, M.D. On appeal from the subsequent judgment dismissing her case against the doctor, White contends that the trial court erred by granting Dr. Diehl's motion for summary judgment, and by denying her motion for continuance of the hearing on the motion for summary judgment to permit her to retain an expert. We affirm the judgment of dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

White filed a complaint against Dr. Diehl on June 15, 2007, which included causes of action for wrongful death, elder abuse, and negligent infliction of emotional distress. She alleged that Dr. Diehl negligently treated her husband, James White, at a convalescent home, resulting in his death on March 20, 2006. Decedent, an octogenarian, suffered from a seizure disorder and was being given an anti-seizure medication called Dilantin. White filed a first amended complaint on October 1, 2007, and a second amended complaint on January 2, 2008.

Trial was set for November 10, 2008. On April 24, 2008, the parties filed a stipulation to continue the plaintiff's deposition and shorten the notice period for Dr. Diehl's motion for summary judgment. The trial court so ordered.

On May 14, 2008, Dr. Diehl filed a demurrer and motion to strike the causes of action for elder abuse and negligent infliction of emotional distress. The court

¹ In addition to Dr. Diehl, White also named as defendants various other entities, including Golden State West Valley Convalescent Hospital, but the judgment at issue in this appeal relates only to White's claim against Diehl, not to any of the convalescent hospital defendants.

sustained the demurrer and motion to strike, without leave to amend. Dr. Diehl filed an answer to the second amended complaint on July 7, 2008.

Dr. Diehl propounded written discovery, and took White's deposition in July 2008. White did not propound any discovery or notice any depositions. Beyond filing the second amended complaint, White apparently did nothing to prosecute the case.

On August 22, 2008, Dr. Diehl filed a motion for summary judgment, supported by the declaration of family practice physician Richard Johnson, M.D. Hearing on the motion for summary judgment was set for October 9, 2008.

On September 5, 2008, White's counsel told Dr. Diehl's counsel that he intended to oppose the motion for summary judgment supported by an expert declaration by a Dr. Gerhardt. Dr. Diehl's counsel pointed out that because Dr. Gerhardt was an orthopedist, his declaration would be incompetent to address the issues involved in this case.

On September 12, 2008, White's counsel stated that the motion for summary judgment would be opposed by way of an expert declaration by Dr. Thomas Grogan. Defense counsel noted the same problem as with Dr. Gerhardt, that Dr. Grogan was a pediatric orthopedist and would be an incompetent witness. White's counsel disagreed.

On September 22, 2008, White served a statutory demand to compromise the matter for \$27,500. White did not serve an expert designation, which was due that day.

On September 23, 2008, defense counsel sent a letter to White's counsel reminding him that opposition to the motion for summary judgment was due the following day. White's counsel responded by letter that he had served his expert

designation on September 19, 2008. Counsel attached a courtesy copy, in which Dr. Grogan was designated as White's expert witness.

On September 29, 2008, White's counsel informed Dr. Diehl's counsel that White would move ex parte to continue the hearing date on the motion for summary judgment. At the ex parte hearing on September 30, 2008, White's counsel stated that the hearing on the motion for summary judgment needed to be continued because counsel had discovered the previous day that Dr. Grogan had a conflict of interest, having worked with Dr. Diehl's counsel's firm on a previous, unrelated matter. White's counsel stated that White had retained a new expert. The trial court informed White's counsel that a motion to augment the expert designation would need to be filed. The trial court gave White until October 6, 2008 to serve and file opposition to the motion for summary judgment. Dr. Diehl's reply papers were due by October 10, 2008, and the hearing date was continued to October 17, 2008.

White served her opposition one day late, on October 7, 2008, and without a supporting expert witness declaration. White submitted only her own declaration in opposition to the motion for summary judgment. White's counsel submitted a declaration requesting an additional continuance to permit him to locate an expert. He stated that he had been led to believe by Dr. Diehl's counsel that the matter would settle.

Dr. Diehl filed reply papers on October 10, 2008, in which he objected to White's declaration.

The motion for summary judgment was heard on October 17, 2008. White's counsel acknowledged that Dr. Grogan was a pediatric orthopedist and would have been incompetent to address the issues involved in this case. He claimed, however, to have located another expert, though he stated the new expert had not

reviewed any of the case documents, and counsel could not say when he would do so. The trial court denied White's request for a further continuance, and granted the motion for summary judgment.

Judgment was entered in favor of Dr. Diehl on November 19, 2008. This appeal followed.

DISCUSSION

I. Dr. Diehl's Expert Declaration

"Generally, '[a] defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail. [Citation.]' (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) The defendant may carry this burden by showing 'that the plaintiff cannot establish at least one element of the cause of action—for example, that the plaintiff cannot prove element X.' (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.) The defendant need not 'conclusively negate' the element; all that is required is a showing 'that the plaintiff does not possess, and cannot reasonably obtain, needed evidence.' (*Id.* at pp. 853-854.)" (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1176.)

In a medical malpractice case, when a defendant moves for summary judgment and supports that motion with an expert declaration that his or her conduct fell within the community standard of care, the defendant is entitled to summary judgment unless the plaintiff brings conflicting expert evidence. (*Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 985.) In our case, in support of his claim that White could not prove one or more elements of her wrongful death cause of action, Dr. Diehl offered expert evidence in the form of a declaration by Dr. Richard Johnson. Dr. Johnson stated that he had reviewed

the decedent's medical records and other relevant information pertaining to decedent's treatment and death. After recounting the events surrounding decedent's death and Dr. Diehl's role in treating him, Dr. Johnson stated his conclusion that "Dr. Diehl's course of treatment, including medication prescriptions, medical assessments, and admission, discharge, and transfer orders from March 14, 2006 through March 20, 2006 were indicated upon decedent's complaints, medical history, clinical findings, and examinations." "Dr. Diehl ordered all appropriate laboratory tests, prescriptions, examinations, consultations, admissions, discharges, and transfers appropriately and within the standard of care. Dr. Diehl's course of treatment was completely appropriate and met the standard of care, particularly in the face of decedent's advanced age and multiple serious medical conditions." He continued: "It is my medical opinion that the care and treatment of Dr. Diehl did not negligently cause, or contribute to, any of decedent's alleged injuries or death or to any of plaintiff's alleged injuries or damages."

The burden thus shifted to White to file opposing evidence from a medical expert. (Code Civ. Proc., § 437c, subd. (o)(2).) She did not do so and thus failed to meet her burden of proof. "In professional malpractice cases, expert opinion testimony is required to prove or disprove that the defendant performed in accordance with the prevailing standard of care [citation], except in cases where the negligence is obvious to laymen. [Citation.]" (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523.) The issues in the present case, including whether decedent received the proper medication and dosage and whether he received treatment in a timely manner in an appropriate facility, are not matters of common knowledge to jurors. Accordingly, "[t]he standard of care [was] a matter peculiarly within the knowledge of experts . . . and [could] only be proved by their testimony"

[Citations.]” (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.)

Because White did not submit competent expert testimony in opposition to the motion for summary judgment, we accept as undisputed facts the statements made in Dr. Johnson’s declaration, including the assessment that Dr. Diehl’s course of treatment was completely appropriate and met the standard of care. In the absence of expert testimony to contradict those facts, we conclude that summary judgment in favor of Dr. Diehl was properly granted.² (See Code Civ. Proc., § 437c, subd. (c).)

We note that White also asserts on appeal that Dr. Diehl’s moving papers failed to negate liability based on Dr. Diehl’s vicarious liability for the acts of other defendants. In the first place, White did not adequately allege facts indicating that Dr. Diehl may be liable for the actions of the agents or employees of the convalescent hospital defendants. In addition, the declaration by Dr. Johnson was broadly stated and encompassed all of Dr. Diehl’s actions in relation to decedent’s care, including his supervision of others who provided care for decedent. Dr. Johnson concluded that “Dr. Diehl ordered all appropriate laboratory tests, prescriptions, examinations, consultations, admissions, discharges, and transfers appropriately and within the standard of care.” White offered no evidence in opposition to the motion for summary judgment to contradict Dr. Johnson.

² White argues on appeal that expert testimony was not required to support her cause of action for elder abuse, and therefore Dr. Diehl was not entitled to entry of summary judgment. However, the cause of action for elder abuse was disposed of by way of demurrer, which was sustained without leave to amend prior to the filing of the motion for summary judgment. White does not challenge on appeal the propriety of the court’s order on demurrer. Thus, the only cause of action which Dr. Diehl was required to address in his motion for summary judgment was the one for wrongful death based upon medical negligence, and expert testimony was necessary to oppose.

II. Denial of White's Request for a Continuance

White argues on appeal that she “was unexpectedly placed in the position of having no expert witness to provide evidence in opposition to the motion for summary judgment when shortly prior to the due date for the opposition, the expert notified Appellant’s counsel that the expert had a conflict of interest.” She contends that the trial court abused its discretion by denying her request to continue the hearing on the motion for summary judgment to enable her to retain another expert. We disagree.

“If it appears from the affidavits submitted in opposition to a motion for summary judgment . . . that facts essential to justify opposition may exist but cannot, *for reasons stated*, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just.” (Code Civ. Proc., § 437c, subd. (h), italics added; see *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.) It is implicit in this statutory language that a continuance of a summary judgment hearing is mandated only upon a *good faith* showing that additional time is needed to obtain facts essential to justify opposition to the motion. (*Id.* at pp. 253-254.) In the absence of such a showing, continuance is not mandatory. In that event, we review the trial court’s denial of appellant’s request for a continuance for abuse of discretion. (*Cooksey v. Alexakis, supra*, 123 Cal.App.4th at p. 254, citing *FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 72.)

The absence of good faith on the part of White’s counsel in seeking a *second* continuance to permit him to obtain an expert witness is apparent from the record. The two doctors counsel proposed to retain to use as experts were both orthopedists, so counsel’s claim that he was “unexpectedly placed in the position of having no expert witness” due to a purported conflict of interest is disingenuous.

As the trial court noted, the doctor with the conflict of interest “wasn’t even a credible expert.” The record also does not support counsel’s representation that he delayed retaining an expert because he believed the case was going to settle. In seeking the continuance, counsel utterly “fail[ed] to adequately account for his delay in retaining an expert.” Counsel did not even attempt to say when he would file an expert declaration by the new doctor he had purportedly retained. Under these circumstances, we conclude the trial court did not abuse its discretion in denying plaintiff’s request for a continuance. Plaintiff’s counsel engaged in no discovery and did nothing to pursue the case; this is simply not the type of scenario in which a second continuance of a hearing on a summary judgment motion would be justified pursuant to Code of Civil Procedure section 437c, subdivision (h).

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to defendant and respondent.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.